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# Supreme Court of the United States.

No. 166.—October Term, 1902.

THE NATIONAL BANK & LOAN COMPANY,
Plaintiff in Error,
vs.
MOSES PETRIE,
Defendant in Error.

*Argument for Defendant in Error.*

This is an appeal from a judgment of the Supreme Court of the State of New York, (p. 16), entered on the verdict of a jury (p. 15), which judgment has been affirmed by the Appellate Division, Fourth Deparment of the Supreme Court of that State, and also affirmed by the Court of Appeals. The judgment is for damages suffered by the defendant in error, the plaintiff below, by reason of the purchase of a five hundred dollar negotiable bond of the plaintiff in error, the defendant below, which purchase was induced by false and fraudulent representations made by the bank's officer, in relation to the value and nature of the bond. The judgment (p. 16) amounted at the date of its re-

covery, October 15, 1898, to $583.50 damages and $200.81 costs, a total of $784.31. This case is a companion case to the National Bank and Loan company, plaintiff in error, against Lillian Traver Carr, defendant in error, No. 165, upon this calendar.

The complaint (Fols. 3-7) sets forth the sale of the bond and representations made by the defendant's president, George H. Sherman, that it "was first-class security, just as good as gold and all right," and that the defendant "as a further inducement to the sale thereof, promised at any time that the plaintiff wanted the money thereon, to take the same back and pay the full face value thereof in cash to this plaintiff, and further stated to plaintiff that it had positive knowledge that the said bond was good, and that the property mortgaged to secure the said bond was ample security therefor, and for the issue of bonds of which the said bond was one." The answer (pp. 12-14) denies the complaint, alleges good faith in the representations made, and that the sale was made by Sherman, an officer of the bank, without authority. It also sets up as a defense that the bank exceeded its corporate power in making sale of the bonds.

## FACTS.

The plaintiff testified (Fols. 19-20) to the following conversation with the President of the Bank: "Mr. Sherman, I have got a little money that I thought I would invest in something if I could get the interest on it for a few years; by and by I

would want the principal." Sherman said: "I have got some bonds here I am about getting—he either had or was going to send his man off down to White Plains to look it up and see as regards the value of the security of them really, what there was back of them; Sherman said, come in the next time you are out, by that time we will know all about it, I can tell you then." Petrie who had five hundred dollars with him left it with Sherman for safe keeping. Sherman placed it to Petrie's credit in the bank. When he called after a lapse of some weeks, Sherman said: "My man has been down there and looked it up and found these bonds are all right, first-class securities and just as good as gold." Petrie said: "Mr. Sherman, I don't know anything about these bonds; I am a farmer. If I take this bond, I have got to rely upon your judgment. After reading along he came to the bond running fourteen years before it became due. Petrie said, Mr. Sherman, I guess I don't want to have anything to do with that. I shall want my money. I don't want to be without this money fourteen years. Petrie started to leave. Sherman followed and said, Petrie you don't think for a minute I would put these bonds on this market without I knew they were first-class security and just as gôod as gold. Petrie said, it has to run a long time, I don't believe I want it, the time is too long; it don't come due until 1906. Sherman said, you bring the bond in here if you should want the money before it comes due, I will give you the money on it. Thereupon Petrie took the bond and paid for it."

At Fol. 22, cross-ex., Petrie swears that Sherman told him that he had sent his man Parmelee who was the cashier of the bank down to make the examination referred to.

Petrie was unable to fix accurately the time when the sale took place. This evidence was supplied from the testimony of the defendant's witness, Charles L. Parmelee, who showed that the bond was taken and paid for on July 1, 1893, (Fol. 65.) The bank had owned the bonds since March 20, 1893. (Fol. 73). Parmelee testified (Fol. 74): "I never went to White Plains. No one went there to investigate these bonds for the bank to my knowledge. The bank did not have any search of the Westchester County Water Works property. Before the purchase of the bonds, I had never seen a copy of the franchise of the Water Works Company in the village of White Plains, nor had the bank to my knowledge; or the contract of the Westchester County Water Works Company with the village of White Plains for the construction of water works. I was cashier of the bank during all this time. I did not have a copy nor did the bank have a copy of the first or second mortgage. I knew that there was a first and second mortgage. We knew that the bonds issued on the first mortgage were not in fact surrendered by the holders on the issue of the second mortgage. I understood that the first mortgage bonds were outstanding as first mortgage bonds, and that the first consolidated were in fact second mortgage bonds. I talked that over with Mr. Sherman."

The correspondence between the bank and the parties of whom it purchased the bonds was destroyed and could not be produced upon this trial. It had been destroyed by direction of the bank. (Fols. 74-77). Such papers were destroyed although it was known at the time that there was a difficulty in relation to the sale of these bonds. Fol. 77).

It appears that the bond for the value of which the suit was brought, was numbered 217 of the denomination of five hundred dollars, issued under a first consolidated mortgage upon the property of the Water Works Company, bearing date January 1, 1890, the principal payable July 1st, 1906, and the interest on January 1st and July 1st of each year at six per cent. per annum, and that said bond was one of a series amounting in all to two hundred thousand dollars, one hundred thousand of which was issued and one hundred thousand of which was reserved to take up a first mortgage then outstanding of one hundred thousand dollars (Fols. 16-18).

The first mortgage of one hundred thousand dollars is also set out. (Fol. 16). It was shown that after January 4, 1894, the Westchester County Water Works Company had failed to pay in full the interest due upon the consolidated bonds of which the plaintiff's bond was one. For 1894 and 1895 it paid part and gave security for the balance. After July 1st, 1896, it ceased to make any payments. (Fol. 29). The bank however continued to pay the plaintiff the amount of his coupons in full down to January, 1896. (Fols. 75-76).

The plaintiff's witnesses upon the trial testified that the entire plant by which these bonds were secured was not worth more than sixty thousand dollars, that being also its costs. (See testimony of Frank Pierce, pp. 23-27, Thomas Stratford, pp. 28-34, pp. 58-59; William L. Banks, pp. 34-37.

Plaintiff also gave in evidence the contract between the Water Works Company and the Village of White Plains and the franchise under which the Water Works Company furnished water in that village (Fols. 41-44) from which it appeared that the village had the right at any time after the expiration of five years to take over the plant by paying the cost thereof and ten per cent. additional. The bond purchased by the plaintiff was therefore wholly unsecured and without value. The case was submitted to a jury who gave a verdict for the plaintiff for the full amount of his claim.

## POINTS.

### I.

THE SALE OF THE BOND TO THE DEFENDANT IN ERROR HAVING BEEN INDUCED BY THE FALSE AND FRAUDULENT REPRESENTATIONS OF THE BANK'S OFFICER AS TO ITS NATURE AND VALUE, HE WAS ENTITLED TO RECOVER THE DAMAGES HE HAD SUFFERED BY REASON THEREOF.

Fairchild vs. McMahon, 139 N. Y., 290.
Rothchild vs. Mack, 115 N. Y., 27.
Daly vs. Wise, 132 N. Y., 306.
Hickey vs. Morrell, 102 N. Y., 454-463.

The bank had in fact owned the bond sold the defendant in error for a considerable time before Petrie had his first talk with Sherman about purchasing it. Sherman told Petrie that he was going to send the cashier of the bank, Parmelee, to White Plains where the property securing the bond was located, to make an investigation as to its value; and he afterwards told Petrie that Parmelee had made such an investigation, although none in fact had been made. Sherman said as a result of such investigation, he was able to tell Petrie that the bond was a first-class security, and as good as gold, and that he would not put out any security unless he, Sherman, knew it to be as good as gold. Not only had no inquiry been made as to the value of this bond by the

bank's officer, but no search had been made of the title of the mortgaged property by any one connected with the bank, and the bank's officers apparently possessed no accurate information in regard to the security except that they were informed that it was a second mortgage bond; but a second mortgage bond cannot be a first-class security. The company issuing the bond made default in the payment of interest soon after it was acquired by Petrie, but the bank kept Petrie ignorant of the worthlessness of his security and the deception that had been practiced upon him, by itself advancing the money to pay the coupons, and taking and holding such coupons which were not redeemed by the Water Works company issuing the bond. This course kept Petrie quiet until the bank stopped paying the coupons, when an investigation revealed the facts set forth.

As to how far the statement made on the face of the bonds that they were "first consolidated bonds" was notice to the purchaser of the fact that they were in the first instance second mort gage bonds, see

Caylus vs. N. Y. K. & Syracuse R. R. Co.,
76 N. Y., 609, S. C. Below, 10 Hun. 295.

But as first consolidated bonds might be first first mortgage bonds, Sherman's representations would be binding in any case.

## II.

## IF THE JUDGMENT IS REVIEWABLE IN THIS COURT ON A FEDERAL QUETION THE PLAINTIFF IN ERROR MUST FAIL ON THE MERITS.

(A.) Having taken the money of the defendant in error on a contract of sale fraudulently induced by the false representations of Sherman, the bank cannot shelter itself behind any statutory limitations of the National Bank act, to escape answering to the defendant in error for the loss he has suffered. If the bank exceeded its authority in dealing in bonds, the penalty for so doing, could not be visited upon the defendant in error, for, if the bank had unlawfully acquired bonds, its first duty was to promptly dispose of them. That is the course usually pursued by the comptroller of currency with banks. Undesirable securities or securities not permitted by the banking law, must be promptly disposed of. If it were otherwise, the bank could never dispose of property which it had acquired in violation of the banking law.

LOGAN NATIONAL BANK vs. TOWNSEND, 139 U. S., 67, is fatal to the appellant's position. Townsend sold to a National Bank for sixty-eight cents on the dollar, $12,800 of bonds of a municipal corporation issued in aid of a railroad, under an agreement that the bank would upon demand return them to him at the same or a less price. Subsequently, he demanded compliance with this agreement, but the bank refused, setting up its want of authority to make the agreement. This defense

was overruled, the court holding that the National Banking Act does not give a National Bank the right to retain bonds coming into its possession under a contract which it was without legal authority to make, in disregard of provisions of the contract beneficial to the person dealing with the bank. Although the bank is not bound to surrender possession of them until reimbursed the full amount due to it, and may hold them as security for the return of the consideration paid, yet when such amount is paid or tendered, and the return of the bonds demanded, its authority to retain them no longer exists. It could not rightfully hold them by virtue of the contract, and at the same time refuse to comply with the terms of the purchase.

Weckler vs. First National Bank, 42 Md. 581, does not apply. In that case the bonds were not purchased by Weckler of the bank, but of an owner for whom the bank was selling as a sales agent on commission. While the bank acted in that capacity, one of the bank's officers, to effect the sale, made false representations, relying upon which, Weckler made the purchase and suffered loss. A recovery by reason of these false representations was denied by the Maryland court on the ground that the bank exceeded its corporate powers in acting as such sales agent. This doctrine even if sound has no application to the case at bar. The purchaser knew that he was dealing with the bank not as a principal, but as a sales agent only, and was bound to take notice of the law preventing the bank from acting in that capacity; while in the case at bar, Petrie was pur-

chasing of the bank, as the owner of the bond. If informed that the bank could not deal in bonds within its corporate power, this would not be notice to Petrie that the bank lacked power to dispose of bonds acquired by it in violation of the banking act. On the contrary, it would be apparent that in making a sale of such securities, the bank was bringing itself into conformity with its charter rights.

(B.) "Where the provisions of the National "Banking Act prohibit certain acts by banks "or their officers, without imposing any pen- "alty or forfeiture, applicable to particular "transactions which have been executed, "their validity can be questioned only by the "United States, and not by private parties."

Thompson vs. St. Nicholas Bank, 146 U. S. 240.

National Bank vs. Matthews, 98 U. S. 621.

National Bank vs. Whitney, 103 U. S. 99.

National Bank of Xenia vs. Stewart, 107 U. S. 676.

Thompson vs. St. Nicholas National Bank, 146 U. S. 240. In this case Thompson deposited with C., his broker, negotiable bonds as margin for purchases of stock. C. pledged the bonds to the National Bank as collateral security for any indebtedness he might owe the bank. While the bonds remained as collateral security for such indebtedness, the bank on the faith of the bonds, certified checks drawn on it by C., when C. had not on deposit in the bank, moneys equal in amount to the checks, in violation of the National Banking Act.

T. sought to recover his bonds from the bank as against an unlawful certification of checks, on the ground that the bank could not hold the bonds as security for a liability incurred by it in violation of such act. The right of the bank to the bonds as collateral security for the unlawful certifications was sustained, the court holding, that where the provisions of the National Banking Act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture, applicable to particular transactions, which have been executed, their validity can be questioned only by the United States, and not by private parties.

Little can be said for a logic or consistency which insists that the plaintiff in error as a National Bank cannot deal in bonds, under the limitations of its charter but if it does deal in bonds, as in this case, by selling to the defendant in error, and in so doing, commits a fraud, a recovery cannot be had against the bank for the damages suffered through its fraud.

(C.) The decision of the state court having proceeded upon a distinct ground not involving a federal question, and sufficient of itself to maintain a final judgment without reference to the federal question involved, the judgment should be affirmed.

Beaupre vs. Noyes, 138 U. S. 397.

Seeberger vs. McCormick, 175 U. S. 274-280.

Eustice vs. Bolles, 150 U. S. 361.

Pierce vs. Summerset Railway, 171 U. S. 641.

Remington Paper Co. vs. Watson, 173 U. S. 443.

The third point for the bank, viz., that Petrie knew that the bank was doing an unlawful business at the time he purchased the bond, is wholly without evidence to sustain it. While the complaint alleges the bank's unlawful dealing, this was a discovery made after the purchase, and as a part of the discovery that he had been imposed upon by Sherman's representations as to the bond. This is made clear by the testimony of Parmelee, cashier of the bank, who testifies at the top of page 44, "The last purchase of the consolidated bonds (one of which was sold to Petrie) was March, 1893." Petrie bought his bond July 1, 1893 (p. 42), so the bank had owned the bond from March until July first before Petrie purchased.

While the bank had no right to acquire the bond for speculative purposes, it might have acquired it lawfully under a pledge, and it would be carrying the doctrine of *ultra vires* to an extreme limit to hold that a farmer about to purchase a bond of the bank, was put upon inquiry as to whether a bank acquired an asset lawfully or unlawfully, which it might have acquired lawfully in the ordinary course of business. As shown elsewhere in the brief, even if he had been informed that the bank had acquired it unlawfully, this would not have prevented the bank from disposing of the forbidden asset, as the duty rested upon it to get rid of the unlawful asset. The case might have been different had the bank undertaken to acquire the bond in the market for Petrie.

III.

This appeal should be dismissed for want of jurisdiction, since this is not a case covered by Section 25 of the Judiciary Act, or Section 2 of the Act of February 5, 1867, "Where any title, right, privilege or immunity is claimed under * * * * any statute of * * * * * or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party."

Walworth vs. Kneeland, 15 How. U. S. 348.
Udell vs. Davidson, 7 How. 269.
Conde vs. York, 168 U. S. 642.

Walworth vs. Kneeland, 15 How. U. S. 348. In this case the plaintiff in error had been commanded in a decree for specific performance, to convey to the defendant in error, a quarter section of land in Wisconsin, pursuant to a contract made between the parties in violation of the laws of the United States, relating to public lands and Walworth, the plaintiff in error, sought to reverse the decree in this court on the ground of the invalidity under the United States laws of the contract which was being enforced against him in a State Court. Chief Justice Taney says: "It is due to "the State Court to say that, in its decree, it "declares that such a contract would be void; "and it decreed in favor of the complainants "upon the ground that it was not proved by "legal testimony, that either Frisbee or Ar- "nold had undertaken to associate them-

"selves with the illegal combination of set-
"tlers, or to use any other unlawful means,
"to enable Walworth to buy the land in ques-
"tion at a reduced price.

"But if it had been otherwise, and the
"State Court had committed so gross an er-
"ror as to say that a contract, forbidden by
"an act of congress, or against its policy, was
"not fraudulent and void, and that it might
"be enforced in a court of justice it would not
"follow that this writ of error could be main-
"tained. In order to bring himself within the
"25th section of the act of 1789, he must show
"that he claimed some right, some interest,
"which the law recognizes and protects, and
"which was denied to him in the State Court.
"But this act of Congress certainly gives
"him no right to protection from the conse-
"quences of a contract made in violation of
"law. Such a contract, it is true, would not
"be enforced against him in a court of jus-
"tice; not on account of his own rights or
"merits, but from the want of merits and
"good conscience in the party asking the aid
"of the court. But to support this writ of
"error, he must claim a right which, if well
"founded, he would be able to assert in a
"court of jutice, upon its own merits and by
"its own strength. No such right is claimed
"in the answer of the plaintiff in error. And
"indeed it would be a novelty in legislation
"and in public policy if Congress had taken
"so much pains to provide for the protection

"of persons who had combined with others
"to perpetrate a fraud on the United States,
"and found themselves in the end the suffer-
"ers by the speculation; or who, by the error
"of a state court, had been compelled to
"share its gains with their associates in the
"fraud. The right or interest claimed in the
"state court must be of a very different char-
"acter, to entitle him to the protection of the
"act of 1789. It has already been so decided
"in this court in the case of Udell and others
"vs. Davidson, 7 How., 769."

Conde vs. York, 168 U. S. 642. In this case, Witherby & Gaffney, a firm of contractors, doing government work, made an assignment of the contract price which they were to receive from the United States government, in violation of Section 3477 of the U. S. Revised Statutes, to York. Later the warrant was issued to Witherby & Gaffney who delivered it to Conde, in payment of a debt due him. York sued Conde in the State Court and Conde set up as a defense that the assignment to York was prohibited by Section 3477, U. S. Revised Statute. The court held, Chief Justice Fuller writing the opinion, that in order to give this court jurisdiction to review the judgment of the state court against the title or right set up or claimed under a statute of or an authority exercised under the United States, that title or right must be a title or right of the plaintiff in error, and not of a third person only; and the statute or authority must be directly in issue. The controversy was merely as to which of the claimants had

the superior equity in the fund; the statute was only collaterally involved; and plaintiffs in error asserted no right to the money based upon it. The writ of error was therefore dismissed.

McCormick vs. Market Bank, 165 U. S., 538, is not in conflict with the foregoing cases. In that case, the bank, before a certificate authorizing it to do business had been issued by the comptroller of the currency, made a five years' lease of a banking house. The certificate was never issued, and in an action by the lessor to enforce the lease, it was held that the bank had exceeded its corporate powers in making the lease, and could only be held under the contract for the time it had been in actual possession. The jurisdiction of this court was sustained on the ground that the plaintiff in error claimed that the United States statute gave the defendant in error power to enter into the lease, and by the judgment of the state court, the plaintiff in error had been deprived of a right accruing to him under this contract by reason of the statute. The plaintiff in error afterwards recovered judgment in an action against the incorporators of the bank. (Seeberger vs. McCormick, 75 U. S. 274) on their liability as agents guaranteeing the authority of their principal by reason of their false assumption of corporate authority. The appeal was dismissed.

The judgment should be affirmed.

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